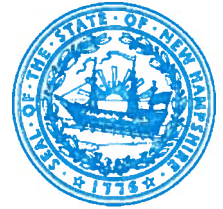




The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

Thomas S. Burack, Commissioner



January 28, 2016

The Honorable Andrew Christie, Chair
House Executive Departments and Administration Committee
Legislative Office Building, Room 306
Concord, NH 03301

RE: HB 1442-FN, An act relative to proposed agency rules under the administrative procedure act.

Dear Representative Christie and Members of the Committee:

Thank you for the opportunity to comment on HB 1442-FN. This bill would amend RSA 541-A, the Administrative Procedure Act, relative to the grounds on which the Joint Legislative Committee on Administrative Rules (JLCAR) can object to a proposed rule by adding as a basis for objection that the rules are "deemed to have a negative impact upon businesses." The bill would also replace the current procedure by which the JLCAR can sponsor a joint resolution to prevent proposed rules from being adopted with a provision that any rules that were subject to a final objection would expire 90 days after becoming effective. The New Hampshire Department of Environmental Services (NHDES) opposes this bill.

An executive branch agency can adopt rules only when the General Court has specifically delegated rulemaking authority to the agency. In the past, the delegated authority was broad -- for example, "any rules necessary to implement this chapter" -- but over the past 10 years the General Court has been much more specific when granting new rulemaking authority and has replaced most of the old (broad) authority with specific authority. For the most part, an agency is authorized to adopt rules to establish specific procedures and criteria for doing whatever the statute authorizes, which then apply to anyone who engages in the activity regulated by the statute, whether an individual or entity.

Additionally, many agencies regulate activities in a way that benefits the general public while placing some burden on the individuals or entities that engage in the regulated behavior. The standard "deemed to have a negative impact on businesses" is so overbroad that any rule which required a business to do anything could arguably have a "negative impact" on the business. Even a rule that required a business to file a report to show compliance with a statutory requirement could be deemed to have a "negative impact" on the business, because the business would have to pay someone to prepare the report and file it.

The proposal to eliminate the established procedure for a joint resolution and instead cause the rules to expire after 90 days is likewise untenable. The joint resolution process was developed as a way for the General Court to exercise "veto authority" over administrative rules without

violating the New Hampshire Constitution. The New Hampshire Supreme Court has specifically held that "the legislature may delegate a portion of the legislative authority to an administrative agency ... [but] it may not delegate its lawmaking authority to a smaller legislative body and thereby evade the requirement for action by a majority of a quorum of both legislative bodies." See Opinion of the Justices, 121 N.H. 552, 560 (1981) (citations omitted). Establishing that rules would expire 90 days after a final objection from the JLCAR does what the N.H. Supreme Court has said would be contrary to the protections provided by the New Hampshire Constitution.

Thank you for your consideration in this matter. If you have questions or need additional information, please contact me at 271-2958 or Gretchen Hamel of my office at 271-3137 or Gretchen.Hamel@des.nh.gov.

Respectfully Submitted,

A handwritten signature in black ink that reads "Thomas S. Burack". The signature is written in a cursive, flowing style.

Thomas S. Burack
Commissioner

cc: Sponsors of HB 1442: Reps. Sanborn, Cordelli, Schroadter, Abrami,
E. Hennessey, Balcom, Pitre, McConnell, Vose, Potucek

